



VOTING RIGHTS ACT

Congress enacted the bipartisan Voting Rights Act of 1965 (VRA) to eliminate widespread practices that suppressed Black Americans from exercising their right to vote. In addition to providing nationwide voting rights protections, it established federal government oversight of jurisdictions that, at the time, engaged in egregious voting discrimination.

The VRA is regarded as one of the most successful pieces of legislation ever passed by Congress, resulting in the eradication of barriers that blocked minority participation in elections. Widespread voting suppression no longer exists in America and minority participation continues to increase:

- In the 2012 presidential election, Black Americans (66.2%) voted at a higher rate than White Americans (64.1%).¹
- According to the Census Bureau, 63% of Black Americans of voting age turned out in the 2020 elections, compared to 61% in 2016.²
- Asian American participation increased 10 percentage points to result in a 59% participation rate in 2020, compared to 49% in 2016.³

BACKGROUND

Section 2. The heart of the VRA is Section 2, which prohibits every state and local government from imposing any voting law that results in racial discrimination, including literacy tests and poll taxes. The original language in this section mirrored the language of the Fifteenth Amendment.^{4,5} Congress amended this section in 1982, after the 1980 Supreme Court decision in *City of Mobile v. Bolden* that held anyone seeking injunctive relief under Section 2 had to prove the laws were written intentionally with racial bias.⁶ The revised statute takes a more comprehensive approach to determining if voting practices have a discriminatory effect; banning laws that “result” in an unequal “opportunity” to vote “on account of race or color” whether or not discriminatory intent can be proven.⁷ The 1986 Supreme Court case of *Thornburg v. Gingles* laid out a threshold test, that when combined with analyzing historical and social circumstances, results in a more comprehensive approach to determining if a law violates Section 2.⁸

Recent litigation has attempted to push the limits of Section 2 by focusing on neutrally written laws that result in certain minority groups being impacted more than others.⁹ The 2021 U.S. Supreme Court decision in *Brnovich v. Democratic National Committee* addressed this issue by raising the bar for Section 2 federal cases to prove restrictions on minorities from being able to participate in the election process. Since Arizona provides vote-by-mail and month-long early voting, it was difficult to prove a discriminatory effect.¹⁰

Section 3. This section established federal court oversight to prevent “the erection of new and onerous discriminatory voting barriers”¹¹ in jurisdictions not covered by Section 5. Courts have the authority under Section 3 to enforce state and local government compliance with the Fourteenth and Fifteenth Amendments and can appoint federal observers to monitor election practices. The court can also require preclearance procedures similar to those in Section 5.¹²

Section 4. Section 4 establishes the coverage formula that determines which states and local governments are subject to additional Department of Justice (DOJ) oversight under Section 5. This section also authorizes the U.S. Attorney General to send federal observers to these jurisdictions.

In *Shelby County v. Holder*, the Supreme Court held the coverage formula in Section 4(3) to be unconstitutional. Chief Justice John Roberts, writing for the majority, stated:

“History did not end in 1965 ... yet the coverage formula that Congress reauthorized in 2006 ... ke[pt] the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”¹³

Section 5 and “Preclearance.” Section 5 was designed as a temporary provision to effectively freeze election laws in certain states until federal officials could review them for discriminatory purpose or effect.¹⁴ It resulted in forcing nine states to obtain pre-approval, or “preclearance,” from the U.S. Attorney General or the U.S. District Court for the District of Columbia before making any changes to their voting laws.¹⁵ This section was intended to be temporary, but since its initial five-year authorization, it has been extended four times. The most recent extension was approved in 2006 and set for 25 years.

In 2009, Chief Justice Roberts wrote for the majority in *Northwest Austin Municipal Utility District Number One v. Holder*, stating:¹⁶

The historic accomplishments of the Voting Rights Act are undeniable... Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels... The statute’s coverage formula is based on data that is now more than 35 years old and there is considerable evidence that it fails to account for current political conditions.

DOJ has continued to veto state-level decisions. Reports have emerged in recent years that suggest biased enforcement by politically motivated bureaucrats, including:

- A 2013 report from the DOJ’s Inspector General documents how the Department passed on hiring nonpartisan qualified attorneys and instead hired the majority of lawyers from five progressive organizations: the ACLU, the National Council of La Raza, the NAACP, the Lawyers’ Committee for Civil Rights Under Law, and the Mexican American Legal Defense and Education Fund.¹⁷
- DOJ rejected the annexation of two white residents into the small town of North, South Carolina, over concerns that they would dilute the African American share of the vote.¹⁸
- Predominantly Black Kinston, North Carolina, was not permitted to switch to nonpartisan elections for City Council. DOJ bureaucrats claimed it would be discriminatory to do so, on the basis Black voters would not know who to vote for if “Democrat” was not listed next to a candidate’s name.¹⁹

In *Shelby County v. Holder*, the Court did not rule on the constitutionality of Section 5 itself. However, without the Section 4 formula, jurisdictions covered under Section 5 are effectively no longer subject to federal oversight.

Other major sections:

- Section 8 authorizes the Attorney General to assign federal observers to monitor voting and vote tabulations.
- Section 11(b) prohibits intimidation, threats, or coercion toward voters or anyone aiding voters. This section demonstrates how the VRA is a colorblind statute and includes protections for all voters, not just minorities.²⁰
- Requirements to provide voting notices, forms and other materials in minority languages is addressed in Section 203 and Section 4(3).

¹ William H. Frey, *Minority Turnout Determined the 2012 Election*, Brookings Institution, May 10, 2013.

<https://www.brookings.edu/research/minority-turnout-determined-the-2012-election/>

² Scott Clement & Daniela Santamarina, *What we know about the high, broad turnout in the 2020 election*, Washington Post, May 13, 2021.

<https://www.washingtonpost.com/politics/2021/05/13/what-we-know-about-high-broad-turnout-2020-election/>

³ *Record High Turnout in 2020 General Election*, U.S. Census Bureau, Apr. 29, 2021, found at

<https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html>

⁴ The Fifteenth Amendment states that the “right of citizens of the United States to vote shall not be denied or abridged ... on account of race, color, or previous condition of servitude.” U.S. Const. amend. XV.

⁵ 52 U.S.C. §10301 (1965).

⁶ *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

⁷ 52 U.S.C. §10301(a) (1965).

⁸ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁹ Brief of Senator Ted Cruz and Ten Other Members of the United States Senate as Amici Curiae in Support of the Petitioners, *Brnovich v. Democratic National Committee*, 594 US __ (2021).

¹⁰ *Brnovich v. Democratic National Committee*, 594 US __ (2021).

¹¹ H.R. Report No. 89–439 at 23 (1965).

¹² Olds, E. K., *More than “rarely-used”: A post-Shelby judicial standard for Section 3 preclearance*, Columbia Law Review, 117, No. 8. (2017).

¹³ *Shelby County v. Holder*, 570 U.S. 529 (2013).

¹⁴ 52 U.S.C. § 10304 (2012).

¹⁵ Section 5 most recently applied to Texas, South Carolina, Arizona, Georgia, Louisiana, Mississippi, Alabama, Virginia, and Alaska. It also applies to parts of Florida, California, New York, North Carolina, South Dakota, Michigan, and New Hampshire.

¹⁶ *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

¹⁷ Office of the Inspector General, *A Review of the Operations of the Voting Section of the Civil Rights Division*, U.S. Department of Justice (2013), found at <https://oig.justice.gov/reports/2013/s1303.pdf>.

¹⁸ Letter from R. Alexander Acosta, Assistant Attorney Gen., Civil Rights Div., to H. Bruce Buckheister, Mayor of North, S.C. (Sept. 16, 2003). <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2170.pdf>

¹⁹ Office of the Inspector General, U.S. Department of Justice (2013), *supra* at 17.

²⁰ “Cases Raising Claims Under Section 11(b) of the Voting Rights Act,” U.S. Department of Justice, September 9, 2019. <https://www.justice.gov/crt/cases-raising-claims-under-section-11b-voting-rights-act>.